Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to 47 U.S.C. §160(c)	)	WC Docket No. 04-416
Pertaining to Qwest's xDSL Services	)	

REPLY COMMENTS OF THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

The Federation of Internet Solution Providers of the Americas ("FISPA"), by its attorneys, hereby submits it Reply Comments to the November 10, 2004, Petition for Forbearance filed by Qwest Corporation ("Petition").[1]

INTRODUCTION

> *The role of the government ought to be like the role of a referee in boxing, keeping the big guys from killing the little guys. If the little guy gets knocked down, the referee should send the big guy to his corner, count the little guy out, and then help him back up…. [not] like professional wrestling [where]: The wrestler and the referee are both kicking the [little] guy on the canvas.* [2]

Granting Qwest's Petition, and those like it, would be another kick and perhaps the final blow to Competitive Specialized Information Solution Providers ("CS-ISPs")[3] and other "small guys" trying to compete in the broadband services market. FISPA does not object to Qwest's

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[1] *Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. §160(c) Pertaining to Qwest's xDSL Services*, WC Docket No. 04-416 (Nov. 10, 2004).

[2] Ted Turner, "Distressed Signal, Big Media gets bigger as public interest shrinks," August 10, 2004, found at www.c-ville.com.

[3] Throughout this Opposition, companies which have traditionally been referred to as independent Internet Service Providers ("ISPs") are referred to as Competitive Specialized Information Solution Providers ("CS-ISPs"). ISP is an antiquated term that is no longer adequate to fully describe the broad scope of unique and specialized information, technology, and Internet services and solutions offered by the industry participants represented by FISPA. The term, ISP, generally describes "Internet access," which is just one of many services provided and functions performed by CS-ISPs. Ultimately, none of the specialized services and solutions offered by CS-ISPs would be possible without continued access to affordable telecommunications facilities, which remain predominantly controlled by the ILECs.

desire to go blow-to-blow with Cable Broadband providers – it's already doing so. Recent statistics clearly show that, even though the RBOCs elected not to show up until the third round, it has been a pretty fair match since they arrived and the RBOCs are quickly gaining points.[4] RBOC DSL is gaining ground on Cable Broadband and it is doing so without the sort of government intervention requested by Qwest and the other RBOCs. Which leaves one to question the real purpose of the rash of broadband forbearance Petitions? The answer is obvious; the Commission must not be used as the RBOCs' tool for stamping out competition from its much smaller rivals.

The Comments representing the competitive side of the industry, the non-incumbents, unanimously support FISPA's Opposition to Qwest's Petition.[5] The conclusion is clear, Qwest's Petition, like those of her RBOC sisters,[6] falls woefully short of satisfying Section 10(a)'s three-prong test required for forbearance. This is the end of the story. Qwest's Petition, and others like it, should be dismissed.

Notwithstanding the overwhelming consensus that Qwest's Petition should be denied, FISPA would be remiss in passing up the opportunity to highlight for the Commission the

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[4] Jupiter Research estimates that by 2008 the U.S. should have a 50% broadband penetration, in which DSL will narrow the 2-to-1 adoption gap, reaching more than 20%, compared to cable modem's nearly 25% share. Jupiter figured DSL lines accounted for 6.7% of total U.S. Internet accessibility in 2003, with cable modem representing 14.4 percent. The divide narrows incrementally until it finally reaches just over 4.5% points in 2008. DSL Leads Globally – US Gap Narrowing - *The global broadband connection of choice is expected to catch up to the cable modem in the U.S.*, Robyn Greenspan, CyberAtlas (November 23, 2003); Recent data released by the FCC indicate that this gap will be closed even sooner. *FCC High Speed Services for Internet Access Services: Status as of June 30, 2004*, Table 7 – High Speed Lines by Technology as of June 30, 2003. S*ee also,* Pew Internet Project Data Memo, at 2 (April 2004) (Providing evidence that DSL now has a 42% share of the home broadband market compared with cable's 54% share), report found at: http://pewinternet.org/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505; .

[5] Comments of Comments of AT&T Corp., Comments of Eschelon Telecom, Inc., Opposition of Covad, Comments of MCI, Inc., Opposition of Computer Office Solutions Inc. d.b.a. SnappyDSL.net, Comments of Time Warner Telecom, XO and Cbeyond, Comments of ALTS, Comments of Earthlink, Inc., Opposition of FSM Marketing Group, Inc., Comments of CompTel/ASCENT, Comments of TEXALTEL, Opposition of Peter Radizeski, and Opposition of Information Technology Association of America.

[6] *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405 (Oct. 27, 2004); *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (Dec. 20, 2004).

genuine concern throughout the competitive industry that, if forbearance is granted, Qwest will discriminate against CS-ISPs and other non-affiliated ISPs to the detriment of the Internet community as a whole.

I. FORBEARANCE WILL ALLOW QWEST, AS A DUOPOLIST, TO VERTICALLY INTEGRATE AND DISCRIMINATE AGAINST NON-AFFILIATED ISPS.

> *A duopoly is a market with just two sellers. Picture a beach with just two ice cream stands. While the vendors may start out anywhere, eventually they will locate in the middle of the beach where they will each be closest to half the bathers. As long as they can lock out any other competition, they can jointly act to raise their prices, lower the quality of their ice cream, and even take a vacation at the same time. As long as this is the only beach to swim at, the bathers will be stuck.*[7]

As so many Comments detail, the retail broadband marketplace described and apparently desired by Qwest and other RBOCs is -- at best -- a duopoly consisting of Cable and the ILECs.[8] To make matters worse, this small measure of choice is denied to the vast majority of business end users where cable is simply not an option at this time.[9] The duopoly partnership between the ILECs and Cable companies does not provide sufficient price discipline that would otherwise exist if the marketplace was, indeed, "robustly" competitive. This is what makes perpetuation of the existing regulatory regime so necessary.

Without regulatory safeguards, Qwest is free to cross-subsidize between unregulated and regulated services and shift its costs from unregulated to regulated offerings. Qwest will have the opportunity and incentive to charge artificially low prices for its unregulated goods and services.[10]

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[7] Sifry, Micha, "Duopoly Money," March 7, 2002, Global Policy Forum: www.globalpolicy.org.
[8] *See Opposition of Covad Communications at pp. 3-6; Opposition of MCI, Inc. at pp. 3-5; Comments of Eschelon Telecom, Inc.*
[9] *See Opposition of Covad Communications* at p.3.
[10] *In the Matter of Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry),* Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (history omitted).

Without continued regulation Qwest will be able to vertically integrate content service and delivery. With vertical integration in place, Qwest becomes free to control who gains access to its network, what content is offered over its network, and what network improvements are necessary. Such an environment indisputably tempts a party, like Qwest, to discriminate in prices and offerings to the detriment of its downstream competitors.

Clearly, a broadband duopoly is problematic for many reasons.[11]

The Commission's concerns about the dangers of duopolies are well grounded in economic theory.[12] "While a number of economic models of oligopolistic behaviors (of which duopoly is, of course, the most extreme example) exist, they coincide in teaching that anti-competitive outcomes increase as the number of firms in a market decreases, particularly in a duopoly situation. This is because of the interdependence between firms built into duopoly: each firm realizes that its "own move has a considerable effect upon [its] competitors, and that this makes it idle to suppose that they will accept without retaliation the losses [it] forces upon them.[13] Consequently, Qwest, and its cable competitor will be able to observe and react to each other's behavior with relative ease, providing them with classic duopolist incentives to act so as to maximize joint profits, to the great detriment of competition in the local telephone market.[14]

In fact, as Covad points out, this is already happening: "[A]ctual marketplace evidence confirms that, rather than competing head on with each other, the cable companies and

[11] Both the CableCo and ILEC have the incentive and ability_ to maintain prices above competitive levels rather than attempting to ruthlessly compete with each other, as they would need to do in a market with multiple firms. Moreover, as MCI notes in its Opposition, the "Commission has consistently embraced the uniformly held view among economists that duopoly markets are insufficiently competitive because of the ever present risk of tacit collusion: that the duopolist will recognize their shared economic interest with respect to price and output decisions and will act, albeit implicitly; so as to achieve supracompetitive profits. *See MCI Comments* at p. 3, citing Xavier Vires, *Oligopoly Pricing, Old Ideas and New Tools* at 6 (1999) (explaining tacit collusion theory) (remainder of citations omitted).

[12] *MCI Opposition* at p. 4.

[13] *Id.* at pp. 4-5 (citations omitted).

[14] *Id.* at p. 5; (citations omitted).

incumbent LECs are carving up the broadband marketplace into separate niches – exactly the sort of exercise of market power one would expect from rational duopolists."[15]

The continued existence of CS-ISPs and diversity of choices they provide to the public rests on their ability to continue to have access to the network facilities needed to deliver their services to end users. The requested forbearance jeopardizes this access and, as such, the Commission may not grant Qwest's Petition for it is not in the public interest.

II. FORBEARANCE WILL STIFLE INNOVATION

The loss of CS-ISPs hurts not only these small businesses and their employees it also hurts the citizen-customers that depend on CS-ISPs to satisfy the special needs that the giant ILEC/Cable duopolists ignore. When more and more customers of non-affiliated ISPs become customers of ILEC duopolists, as will happen in greater numbers if forbearance is granted, the duopolist's emphasis will inevitably shift from taking risks to taking profits. When this happens, quality, choice, innovation and the consumer will suffer the consequences.

History shows that it was the existence of an openly competitive environment that stimulated the development of the World Wide Web and commercial Internet. Continued innovation depends on an open architecture. An unregulated duopoly environment necessarily limits Qwest's incentive to aggressively compete and innovate.

Non-RBOC entities, those that have not been born, bred and matured as a monopoly, of necessity, have had to innovate and create service distinctions that appeal to various niche markets. If the marketplace consists of only the ILEC/Cable duopoly, innovation is destined to stall and American consumers, businesses and the overall U.S. economy will suffer the consequences.

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[15] *See Opposition of Covad Communications* at p. 5.

CONCLUSION

Thus, in line with the arguments of the majority of commenters, the current state of competition in the market for wholesale broadband services necessitates the denial of Qwest's Petition. FISPA joins other CS-ISPs, independent ISPs, and competitive companies in urging the Commission to deny Qwest's requested forbearance and, instead, vigorously enforce these rules. To do otherwise would decimate CS-ISPs, which are a vital, yet ailing, part of this nation's Internet economy.

RESPECTFULLY SUBMITTED,

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